Supreme Court, U.S.
FILED
00 53 JUL 10 2000
OFFICE OF THE CLERK

No. 00-

IN THE
Supreme Court of the United States

BEVERLY TUCKER,

Petitioner,

v.

ROBERT C. WOLTER, Attorney;
DEBRA J. GREER, Attorney;
LAW FIRM OF WOOD, BOYKIN & WOLTER,
a Professional Corporation;
MICHAEL DAVID BOUDLOCHE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

SAM A. WESTERGREN
615 Leopard Street
Suite 835
Corpus Christi, Texas 78476
(361) 887-0083

Attorney for Petitioner

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, DC ✦ 1-800-347-8208

28 pp

QUESTION PRESENTED

Was the Court of Appeals correct in holding that Petitioner was not entitled to Rule 60(b) relief in this case when it was not controverted that there was no fault by Petitioner, the fault was with the bankruptcy court for not notifying Petitioner of the order at issue, and Petitioner was entitled to equitable considerations?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding is not required, since the names of all parties appear in the caption of the case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Proceedings Below 3

B. Statement of Facts 4

REASONS FOR GRANTING THE PETITION 4

ARGUMENT TO SUPPORT GRANTING THE PETITION 5

CONCLUSION 7

APPENDIX 1a

Opinion of Fifth Circuit 1a

Final Order of District Court 4a

Denial of Motion for Rehearing 5a

Affidavit of Petitioner 7a

TABLE OF AUTHORITIES

Page(s)

CASES:

Klapprott v. United States, 335 U.S. 601, 613-614, 69 S.Ct.384 (1949) 5

Pioneer Investment Services Company v. Brunswick Associates *Limited* Partnership, 507 U.S. 380, 113 S.Ct. 1489 (1993) 6

Radack v. Norwegian American Line Agency, 318 F.2d 538 (2nd Cir. 1963) 7

IN THE

Supreme Court of the United States

BEVERLY TUCKER,

Petitioner,

v.

ROBERT C. WOLTER, Attorney;
DEBRA J. GREER, Attorney;
LAW FIRM OF WOOD, BOYKIN & WOLTER,
a Professional Corporation;
MICHAEL DAVID BOUDLOCHE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Beverly Tucker respectfully petitions for a writ of certiorari to review the holding of the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel decision of March 6, 2000 of the Fifth Circuit (Pet. App. 1a) is unpublished, at the discretion of the Fifth Circuit pursuant to 5TH CIR. R. 47.5.4. A petition for rehearing was filed. The Petition for Rehearing was denied on April 11, 2000 (Pet. App. 5a). The final order of the United States District Court for the Southern District of Texas, Corpus Christi Division was entered on January 12, 1999 (Pet. App. 4a).

JURISDICTION

The District Court has jurisdiction of the appeal from Bankruptcy Court under 28 U.S.C. § 1334 and 28 U.S.C. §158(a)(1) pertaining to appeals from a final judgment and a final order from the Bankruptcy Court. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 158(d).The Court of Appeal's decision was March 6, 2000 and the petition for rehearing was denied on April 11, 2000. This Court has jurisdiction to issue this writ under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This a case which involves the interpretation of Rule 60(b) of the Federal Rules of Civil Procedure.

Rule 60(b), reads in relevant part, as follows:

Rule 60. Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3)

not more than one year after the judgment, order, or proceeding was entered or taken.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Courts Below.

Petitioner filed a personal injury suit in San Patricio County, Texas State District Court on July 8, 1996. Respondents were attorneys who had represented her husband, Danis Tucker, in bankruptcy proceedings. Petitioner was not a party to the bankruptcy case.

On or about the 7th of August, 1996, Respondents removed the case to the United States Bankruptcy Court for the Southern District of Texas, Corpus Christi Division, the main ground for removal being the contention that Appellant's causes of action were part of her husband's bankruptcy estate.

On September 6, 1996 Petitioner filed her Motion to Remand in Bankruptcy Court disputing the allegation that her cause of action was property of the bankruptcy estate, and other affirmative defenses to bankruptcy removal, mainly that the bankruptcy court had no jurisdiction over personal injury claims.

Even though Petitioner was not a party to the bankruptcy case, the bankruptcy court held that Petitioner was bound under the principles of *res judicata* because of the approval of a fee application of Respondents for Petitioner's husband after Respondents had withdrawn from representing him.

The bankruptcy court overruled the amended 60(b) filed by the undersigned for Petitioner.

The district court affirmed the bankruptcy court on the basis that success on the merits was remote (Pet. App. 4a).

It is conceded by Respondents and confirmed by the Fifth Circuit (Pet. App. 2a) that the bankruptcy court failed to have a copy of the summary judgment served on Petitioner. It is also confirmed by the Fifth Circuit that Petitioner received actual notice of the summary judgment entry on April 16, 1997 (Pet. App.2a). The Fifth Circuit also acknowledged that Petitioner filed a Motion for the Court to allow her to file an appeal the next day, April 17, 1997 (Pet. App.2a).

The Fifth Circuit denied Petitioner's motion for rehearing on April 11, 2000 (Pet. App. 5a), thereby resulting in this writ.

B. Statement of Facts

Petitioner's causes of action against Respondents sounded in tort and were also for legal malpractice against Respondents. Petitioner claimed that the professional negligence of Respondents proximately resulted in substantial damages to her interest in the marital estate and caused her mental pain and anguish.

Petitioner's Affidavit filed in support of the Amended 60(b) Motion (Pet. App.7a) clearly sets forth the underlying 60(b) facts in this case. It confirms that she was not a party to the underlying bankruptcy proceeding fee application for which she was precluded from any relief under *res judicata*.

None of the opinions of any of the lower court even mention that she was not a party to the bankruptcy proceeding.

REASONS FOR GRANTING THE PETITION

Since this Court's holding in *Klapprott v. United States*, 335 U.S. 601, 613-614, 69 S.Ct.384 (1949), litigants who have been unable to timely appeal a judgment due to factors beyond their control, have always had some residue of hope that their case could be pursued if they were not at fault. This very important pearl of justice was again confirmed by this Court in *Pioneer Investment Services Company v. Brunswick* Associates Limited Partnership, 507 U.S. 380, 113 S.Ct. 1489 (1993).

It is submitted that the strongest reason for this Court to grant this petition is to reaffirm that if a litigant is free of fault and is clearly entitled to equitable considerations her plaintive cries will be heard. This is such a case, one for which the supervisory authority of this Court over the federal court system must be exercised.

ARGUMENT TO SUPPORT GRANTING THE PETITION

The best argument for granting this petition is for this Court to take only a brief glance at the panel decision of the Fifth Circuit in this case (Pet. App. 1a).

The Fifth Circuit finds that Petitioner did not receive notice of the bankruptcy court judgment at issue because of the fault of the bankruptcy court and that Petitioner's failure to receive the order in time to file a timely appeal was not her fault and that she filed for relief from this judgment withing one day of receiving actual notice of it. The Fifth Circuit stated that Petitioner is "clearly entitled to equitable relief" (Pet. App. 2a).

After making these findings the Fifth Circuit states the law correctly that Rule 60(b) permits a trial court to relieve a party of a final judgment for, among others, surprise or for any other reason justifying relief and then states that the 60(b) is primarily an instrument of equitable relief (Pet. App. 3a).

The court then holds that Petitioner had not made a claim for 60(b) relief in her 60(b) appeal (Pet. App. 3a).

In *Klapprott v. United States*, 335 601, 613-614, 69 S.Ct.384 (1949), the Petitioner was allowed by this Court to set aside an order admitting Petitioner to citizenship and canceling his certificate of naturalization. More than four years later, he petitioned the same court to set aside the default judgment, but the petition was denied on the ground of laches. In reversing the lower courts, this Court through Justice Black stated the

following rationale of setting aside adverse judgments entered due to circumstances beyond the Petitioner's control:

> ". . . It is contended that the one-year limitation [of subsection (1)] bars petitioner on the premise that the petition to set aside the judgment showed, at most, nothing but 'excusable neglect.' And of course, the one-year limitation would control if no more than 'neglect' was disclosed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b). But petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part. The **undenied** facts set out in the petition reveal far more than a failure to defend . . . due to inadvertence, indifference, or careless disregard of consequences." 335 U.S., 601, 613. [emphasis by the undersigned]

Petitioner's affidavit has been undisputed in this case.

In *Pioneer Investment Services Company v. Brunswick* Associates Limited Partnership, 507 U.S. 380, 113 S.Ct. 1489 (1993), this Court again reaffirmed the rationale of the policies and justice necessary to formulate proper relief for a party who had not filed a claim timely due to carelessness of the claimant's attorney.

Petitioner contends that the rationales of *Klappnott* is reinforced by this Court in *Pioneer*. Although the issue in *Pioneer* was "excusable neglect", an equitable concept, this Court held that it was too harsh to require proof of circumstance beyond the Petitioner's control in order to constitute excusable neglect.

Thus, if excusable neglect can be established without having to establish circumstances beyond the control of Petitioner, it certainly follows in the instant case that Petitioner should be granted relief. Relief certainly should follow as the Court of Appeals found fault with the bankruptcy court and no

fault with Petitioner, and that Petitioner is entitled to equitable considerations.

In *Radack v. Norwegian American Line Agency*, 318 F.2d 538 (2nd Cir. 1963), a state personal injury case had been removed to federal court. After joinder of issue, the case was called on the Special Review Calendar and the plaintiffs' case was dismissed for lack of prosecution. The evidence showed that the plaintiffs' counsel did receive notice of the calendar call, and did not appear; however, plaintiff's counsel did not receive notice of the dismissal of the action, which occurred at the calendar call, until fifteen months later when the attempted to serve interrogatories. 318 F.2d 538, 541 The 2nd Circuit Court of Appeals held as follows:

> ". . . If no notice of the entry of judgment was ever received by appellees the court had the power to vacate the judgment and this appeal should be dismissed . . ." 318 F.2d, 538, 543.

Certainly this Court will hold that Petitioner is entitled to relief due to so many factors in her favor being undisputed as found by the Court of Appeals. Petitioner has no other remedy unless this Court grants this writ.

CONCLUSION

For these reasons, Petitioner's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SAM A. WESTERGREN
615 Leopard Street
Suite 835
Corpus Christi, Texas 78476
(361) 887-0083

July 10, 2000

Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40203

In The Matter Of: DANIS R. TUCKER,
doing business as Ralph's Foods Co.,
doing business as Laredo Spice Co.,
doing business as Pepper Tree Foods,
doing business as Nevada Converting Company,
doing business as Silver State Bookkeeping,
doing business as Fifth Avenue Fashions,
doing business as B.G. Tucker,

Debtor.

BEVERLY TUCKER,

Appellant,

versus

ROBERT C. WOLTER, Attorney;
DEBRA J. GREER, Attorney;
LAW FIRM OF WOOD, BOYKIN & WOLTER,
a Professional Corporation;
MICHAEL DAVID BOUDLOCHE,

Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(C-98-CV-389)

FILED MAR 06 2000
CHARLES R. FULBRUGE III
CLERK

Before JOLLY and DeMOSS, Circuit Judges, and DOWD,* District Judge.

PER CURIAM:**

Beverly Tucker appeals the denial of her Rule 60 (b) motion by the district court and the bankruptcy court. Her motion sought to set aside a summary judgment granted by the bankruptcy court, which denied her legal malpractice claim against the appellees' attorneys on grounds that the underlying facts supporting her malpractice claim have been litigated and resolved earlier in the bankruptcy proceeding. Unfortunately, she did not receive notice of the bankruptcy court's order issued on March 12, 1997 until April 16, 1997, because the bankruptcy court failed to list her as a person entitled to notice of the order. Everyone agrees that her failure to receive the order was not her fault. The next day, April 17, she filed a motion asking the court to allow an out-of-time appeal. However, because untimely appeals may be allowed only within twenty days of the expiration of the ten-day period for appeal, *see* Federal Bankruptcy Procedure 8002(c), the bankruptcy court was powerless to allow the appeal because thirty-six days had expired after the bankruptcy court had entered its order. In other words, although it would appear that Beverly Tucker is clearly entitled to equitable considerations, the courts, including this court, are powerless to grant her equitable relief in the form of an out-of-time appeal, which we take from her brief she is effectively requesting.

Furthermore, we must keep in mind that the appeal before us is from a judgment denying relief under Rule 60 (b). Federal

---

* District Judge of the Northern District of Ohio, sitting by designation.

** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in the 5TH CIR. R. 47.5.4.

Rule of Civil Procedure 60 (b) permits a trial court to relieve a party of a final judgment because of mistake, inadvertence, surprise, excusable neglect, newly discovered evidence or fraud; or because a judgment is void or no longer deserving of prospective application; or for any other reason justifying relief. *See Hill v. McDermott. Inc.*, 827 F.2d 1040, 1042 (5th Cir. 1987). This rule originated in response to the "plaintive cries of parties who have for centuries floundered. . . among the snares and pitfalls of the ancillary common law and equitable remedies." *Banker's Mortgage Co. v. United States*, 423 F.2d 73, 77 (5th Cir. 1970), *cert. denied*, 90 S.Ct. 2242 (1970). Thus, Rule 60 (b) is primarily an instrument of equitable relief. It is not to be "made a vehicle for the relitigation of issues." *Id.* at 79. Nor is it to be used as a substitute for, or alternative to, appeal. *See Hill v. McDermott. Inc.*, 827 F.2d at 1042 (citing *Alvestad v. Monsanto Co.*, 671 F.2d 908, 912 (5th Cir.) 1982)); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. Unit A Jan. 1981); 7 J. Moore & Lucas, Moore's Federal Practice ¶ 60.18[8] at 60, 140-41 (2d ed. 1985). Therefore, a party may not invoke Rule 60 (b) to avoid the expiration of the time for appeal or to simply seek reconsideration of claims. *Id.*

Ms. Tucker fails to make any claim in her brief that would entitle her to relief under Rule 60 (b). Her brief states as follows: "The issues in this case are all legal. The specific issue which has brought forth this appeal revolve around the Bankruptcy Court's denial of Appellant's Rule 60b Motion to Vacate a Summary Judgment, which Appellees admit was **not** sent to her by the Court in time to initiate an appeal."

In sum, because none of the arguments made by Ms. Tucker fall within the purview of relief available under Rule 60 (b), the district court's judgment affirming the bankruptcy court's decision denying relief from judgment under Rule 60(b) is

AFFIRMED.

APPENDIX B

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CA. NO. C-98-389
CA. NO. C-98-401

BEVERLY TUCKER

v.

ROBERT C. WOLTER, ET AL.

ENTERED JAN 12 1999
Michael N. Milby
Clerk of Court

ORDER AFFIRMING THE BANKRUPTCY COURT

The Court affirms the decision of the bankruptcy court not to grant the appellant's motion for relief from judgment under Fed. R. Civ. Pro. 60(b). The Court has reviewed the claims sought to be presented by the appellant in this adversary proceeding, and heard oral argument. The Court finds the likelihood of success on the merits to be remote. The claims sought to be presented by the appellant are foreclosed by the decision of the bankruptcy judge approving the appellees' final fee application in the bankruptcy case, and finding there to be no negligence in the performance of the appellees..

ORDERED this 8 day of January, 1999.

/s/ H.W. Head Jr.
H.W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40203

In The Matter Of: DANIS R. TUCKER,
doing business as Ralph's Foods Co.,
doing business as Laredo Spice Co.,
doing business as Pepper Tree Foods,
doing business as Nevada Converting Company,
doing business as Silver State Bookkeeping,
doing business as Fifth Avenue Fashions,
doing business as B.G. Tucker,
Debtor

BEVERLY TUCKER,
Appellant

v.

ROBERT C. WOLTER, Attorney;
DEBRA J. GREER, Attorney;
LAW FIRM OF WOOD, BOYKIN & WOLTER,
a Professional Corporation;
MICHAEL DAVID BOUDLOCHE
Appellees

Appeal from the United States District Court
for the Southern District of Texas, Corpus Christi

FILED APR 11 2000
CHARLES R. FULBRUGE III
CLERK

ON PETITION FOR REHEARING

Before JOLLY and DeMOSS, Circuit Judges, and DOWD,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly

United States Circuit Judge

CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

---

* District Judge of the Northern District of Ohio, sitting by designation.

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

No. 94-21485-C-7
CHAPTER 7
ADVERSARY NO. 96-2124-C

IN RE: DANIS R. TUCKER
D/B/A RALPH'S FOODS CO., ET AL
Debtor.

BEVERLY TUCKER,
Plaintiff,

vs.

ROBERT C. WOLTER, ATTORNEY
DEBRA J. GREER, ATTORNEY and
THE LAW FIRM OF WOOD, BOYKIN & WOLTER,
A PROFESSIONAL CORPORATION,
Defendants.

AFFIDAVIT OF BEVERLY TUCKER

STATE OF TEXAS

COUNTY OF NUECES

On this day, BEVERLY TUCKER appeared before me, the undersigned notary public, and after I administered an oath to her, upon her oath, she said:

"My name is BEVERLY TUCKER. I am capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

I am over the age of eighteen. I am the only Plaintiff in a legal malpractice lawsuit which I filed against attorney Robert Wolter, attorney Debra Greer and the Law Firm of Wood, Boykin & Wolter. I represented myself until November of 1997 when attorney Sam Westergren agreed to represent me in this case. My personal injury damages claims against the lawyer Defendants are for their negligence and breach of their duties to me and my legal, personal and property interests during the period of time that they represented my Husband Danis Tucker. During this same period time they were also my lawyers. They never advised me that there was a conflict of interests between my rights and the rights of my husband. They never advised me to seek another lawyer.

I am the wife of Danis Tucker who is the debtor in the main bankruptcy case, Cause No. 94-21485-C. I did not file the bankruptcy petition with my husband. I was not in favor of his filing for bankruptcy as I was concerned about the effect this would have on him and I was also concerned about the effect that this would have on me, as we had been married over 20 years at the time the bankruptcy was filed in July of 1994. I believe that the entire matter had been brought about because of a misunderstanding between my husband and the A & D Christopher Ranch. The A & D Christopher Ranch was one of the produce suppliers of my husband's business, "Ralph's Foods". Because of this misunderstanding they had filed a state court suit in California which I believe was not properly or legally done. I believe that if the Defendants had properly advised my husband and me about the illegality of this judgment, the matter could have been worked out between my husband and the A & D Christopher Ranch. I never thought that bankruptcy was the way to handle this, especially in view of the fact that my husband and the A& D Christopher Ranch had enjoyed a long term, good business relationship. I never dreamed that filing a Chapter 11 bankruptcy, in accordance

with the advice of these Defendants would result in its conversion to a Chapter 7 bankruptcy, resulting in the complete destruction and liquidation of the business my husband had built up over many years.

I am not a highly educated person. I have only a high school education and I have no formal legal education or training of any type. The Defendants are represented by Mr. Harrell Z. Browning. Mr. Browning served as a mediator, appointed by the Hon. Richard S. Schmidt, United States Bankruptcy Judge, pertaining to some disputes in the main bankruptcy case. I was present at the mediation and also signed the mediation agreement. One of the Defendants in this case, attorney Debra Greer, was also present at this mediation in the fall of 1994. I understood that Mr. Browning was acting as a mediator and that anything I told him would be held in confidence by him unless I told him otherwise. I do recall stating things to Mr. Browning about how this bankruptcy had effected me personally and also about how complicated bankruptcy was. I did not authorize Mr. Browning to disclose this information to anyone. I was certainly shocked, after I filed my suit against these Defendants when I later found out that Mr. Browning was their lawyer. I did not know what to do about this at first. It took me some time to figure out that I should file a motion to disqualify Mr. Browning, which I did.

Though I am not a highly educated person, I did believe that I have been wronged by these Defendants as lawyers since they also represented me in these matters even though I did not file for bankruptcy along with my husband. I believe that they have not done what they were supposed to do in taking care of my interests during these matters. I believe that they should have advised me of my rights which were different from my husband's rights. They never advised me of any of my rights and they never advised me to seek another attorney for advice concerning my rights. I believe that I have suffered consider-

ably as a result of these Defendants not doing their duties towards me. My means of making a living, on my own, have been greatly damaged. I have suffered extreme mental anguish. I believe that I have suffered mental anguish because I have never suffered like this before in my life. My mental suffering is many times accompanied by physical symptoms that I have never had before, such as extreme anxiety, insomnia and inability to cope with the ordinary trials and tribulations of life. I have become practically destitute. I believe that the wrongful acts of these Defendants are a cause of my present condition which I have described.

After researching the matter myself, I believe that I had a case against these Defendants because of injuries caused to me and that any damages I would recover would be my own property and not part of the community property of my husband. I certainly believe that I am right that a married woman has identity and property rights separate from her husband.

The first item that Mr. Browning filed for these Defendants was a motion to remove this case to the bankruptcy court in Corpus Christi, Texas. I did file a motion to remand the case back to state court, but this motion was never decided by the bankruptcy judge. During this hearing on the motion to remand Mr. Browning mentioned to the bankruptcy judge, the Hon. Richard Schmidt, that my case was not any good because the Defendants' attorneys fees had been approved by the Court at an earlier time in my husband's bankruptcy case. I did not realize what Mr. Browning could have been talking about since I did not file bankruptcy with my husband and I was not a party to his bankruptcy and I certainly did not approve of paying these Defendants for legal work as I believe they caused a lot of damage to my husband and also to me. I recall Judge Schmidt stating that a summary judgment motion should be filed. This was done by Mr. Browning and I filed a response to it. A hearing was held on the summary judgment motion on

November 25, 1996. Judge Schmidt did not state when he would rule on the motion. It was my definite impression from his comments and the issues in the case that it would be some time before he would make a ruling on the summary judgment motion. I had observed many of the motions and rulings by Judge Schmidt in my husband's bankruptcy case and knew that some rulings could take some time.

Even though I was still representing myself at this time, I did not know a lot about the bankruptcy rules. I knew that I should check as much a possible with the clerk's office in the bankruptcy court in Corpus Christi to see if Judge Schmidt had made any decision on the summary judgment issue. I am known at the bankruptcy clerk's office in Corpus Christi as I had been in the clerk's office numerous time since July of 1994 to check on the status of various filings and rulings pertaining to my husband's bankruptcy case and related adversary proceedings and the numerous filings and rulings of the bankruptcy court that had occurred. Certainly Mr. Browning knew that I would file an appeal if the judge decided the summary judgment against me.

The hearing on the summary judgment was on November 25th, 1996. I did not find out about the decision until April 16th, 1997. I would accompany my husband, Danis Tucker, most of the times he would go to the bankruptcy clerk's office in Corpus Christi to check on the multiple rulings and filings in his main case and several adversary proceedings relating to his main case. We would be in bankruptcy hearings very often. Every time we would go to a hearing we would also check the status of cases in the bankruptcy clerk's office. After November 25th , 1996 I was constantly checking the status of my case. I was with him in the bankruptcy clerk's office in Corpus Christi on April 16, 1997, when Danis Tucker asked one of the clerks to access the computer for him, as neither one of us know how to use the computer. Danis was looking at the

docket sheet for the main case on the computer. While he was doing this he noticed that there was a docket entry from this adversary of mine which appeared on the docket sheet of the main case on the computer. Neither one of use understood the docket entry, so we asked one of the clerks about it. The clerk got us the file and I then discovered that Judge Schmidt had decided against me on the summary judgment decision. I remember noticing on the decision that it had attached to it a certificate of service which did not include my name. A true copy of this certificate of service which appeared on Judge Schmidt's decision of March 12, 1997 is attached hereto as Exhibit "1". I was very shocked and surprised that the decision went against me and extremely shocked that I had not received a copy of the adverse decision. The clerk was also surprised and said that it must be a mistake that I had not received a copy of the decision.

I later found out, in November of 1997, that Mr. Browning had been faxed a copy of the order on March 14, 1997. A true copy of the order and the fax transmittal to Browning is attached hereto as Exhibit "2 ". Had I been served with a copy of the decision by being mailed a copy on March 14, 1997, I surely would have received a copy at least during the week of March 17, 1997, and certainly no later than March 22nd, 1997, which was a Saturday. My mailing address and name as the Plaintiff representing myself was correctly set forth in the records and docket sheet of this case. I never received a copy of the order in the mail. This is the first time I did not receive a copy of an order or notice that was supposed to be mailed from the clerk's office.

I wish to emphasize that I was still representing myself during this period of time and was certainly not as familiar with the bankruptcy rules as Mr. Browning was. I know that he got this impression about my lack of knowledge of bankruptcy procedure during the long mediation session mentioned above.

However, I was extremely interested in knowing what Judge Schmidt's decision on the summary judgment was. Even as a non-lawyer, I knew that this was a very important decision in my case against these Defendants. I knew that if the case went against me and that if nothing further was done that I would not have a case against these Defendants. I checked my mail very carefully each and every day. In addition, I would accompany my husband, Danis Tucker, to the bankruptcy court and the bankruptcy clerk's office in Corpus Christi numerous times to assist him in checking out the numerous rulings, filings and docket entries made in his main case and the adversary proceedings involved in his main case. I just knew as a matter of common sense that the clerk's office is a very busy place and that I wanted to know as soon as Judge Schmidt had made his decision what his decision was. I did not know at the time that there was a legal requirement to monitor the docket to look for an order when a decision was pending in a case. However, I did, in fact monitor the docket and the status of this decision in my case many times from the date of the hearing of November 25, 1996 through the date that I discovered the existence of the order on April 16, 1997.

I did this because the matter was very important to me and not a day passed by when I didn't think that Judge Schmidt might have made a decision. I can certainly state that I kept a constant lookout for this order.

I can certainly demonstrate the fact that I was continually present at the bankruptcy court and the bankruptcy clerk's office in Corpus Christi from November 25th, 1996, the day of the summary judgment hearing and March 12, 1997, the date of Judge Schmidt's decision on the summary judgment. I have attached as Exhibit "3" a portion of the docket sheet in my husband's main bankruptcy case. As can be seen, the docket entries begin on 11/5/96 and go through 4/17/97, there was a lot of activity between November 25th, 1996 and March 12th, 1997

in my husband's main bankruptcy case. When I was in bankruptcy court right after November 25th, 1996 and before March 12th, 1997, I heard Judge Schmidt many times make announcements on rulings in my husband's bankruptcy case or make comments about other pending matters, but he never made any statement about any decision being made on the summary judgment motion in this case. I was in bankruptcy court in late February of 1997 and also I was there on March 6, 1997 and nothing was ever mentioned about any pending ruling or decision on the summary judgment motion in this case.

Even though I am not knowledgeable in these matters, I did file a motion with the Court on April 17, 1997, the day after I had discovered the adverse decision of Judge Schmidt. Before this motion was decided I looked into this matter some more and I also filed a motion to vacate Judge Schmidt's decision. Judge Schmidt has never ruled on my motion to vacate which I filed on July 2nd, 1997.

If there is any justice, the judge's order of March 12, 1997 should be set aside.

Executed this the 22 day of January, 1998.

/s/ Beverly Tucker
BEVERLY TUCKER

SWORN TO and SUBSCRIBED before me by Beverly Tucker on January 22nd, 1998.

/s/ Kim Chapa
Kim Chapa
Notary Public, State of Texas
Comm. Exp. 01-27-2001

Supreme Court, U.S.
FILED
AUG 8 2000
CLERK

No. 00-53

IN THE

Supreme Court of the United States

BEVERLY TUCKER,

Petitioner,

v.

ROBERT C. WOLTER, Attorney, DEBRA J. GREER, Attorney, LAW FIRM OF WOOD, BOYKIN & WOLTER, a Professional Corporation, and MICHAEL DAVID BOUDLOCHE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

LAURA M. BAKER
329 Wilshire Place
Corpus Christi, Texas 78411
(361) 814-0332

RONALD A. SIMANK
Counsel of Record
SCHAUER & SIMANK, P.C.
615 North Upper Broadway
Suite 2000
Corpus Christi, Texas 78477
(361) 884-2800

Attorneys for Respondents Robert C. Wolter, Attorney, Debra J. Greer, Attorney, and Law Firm of Wood, Boykin & Wolter, a Professional Corporation

161455

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

14 pp

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
A. Course of Proceedings and Disposition in the Courts Below	1
B. Statement of Facts	2
Summary of the Argument	4
Reasons for Denying the Writ	5
Petitioner Has Failed To Demonstrate That This Case Involves Considerations Justifying Review On Certiorari.	5
Conclusion	9

TABLE OF CITED AUTHORITIES

Page

Cases:

Beshear v. Weinzapfel, 474 F.2d 127 (7th Cir. 1973) 8

Boyd v. Bulala, 905 F.2d 764 (4th Cir. 1990) 8

Greater Baton Rouge Golf Ass'n v. Recreation and Park Comm'n for the Parish of East Baton Rouge, 507 F.2d 227 (5th Cir. 1975) 6

In re W.J. Servs., Inc., 139 B.R. 824 (Bankr. S.D. Tex. 1992) 3

Klapprott v. United States, 335 U.S. 601, 69 S. Ct. 384 (1949) 7, 8, 9

Leong v. Transfer Serv., Inc., 302 F.2d 555 (7th Cir. 1962) 6

Madsen v. Bumb, 419 F.2d 4 (9th Cir. 1969) 8

Murray v. District of Columbia, 52 F.3d 353 (D.C. Cir. 1995) 7

Pease v. Pakhoed Corp., 980 F.2d 995 (5th Cir. 1993) 8

Russell v. Cunningham, 279 F.2d 797 (9th Cir. 1960) 6

Cited Authorities

	Page
Spann v. Commissioners of the Dist. of Columbia, 443 F.2d 715 (D.C. Cir. 1970)	6
Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969)	6
United States v. Timbers Preserve, Routt County, Colo., 999 F.2d 452 (10th Cir. 1993)	8
Rules:	
Bankruptcy Rule 9024	5
Federal Rule of Civil Procedure 60(b)	*passim*
Federal Rule of Civil Procedure 60(b)(1)	4, 6
Federal Rule of Civil Procedure 60(b)(6)	4, 6, 8, 9

Respondents, Robert C. Wolter, Attorney, Debra J. Greer, Attorney, and Law Firm of Wood, Boykin & Wolter, a Professional Corporation, (hereinafter collectively referred to as the "Law Firm"), respectfully request that the Petition for Writ of Certiorari filed by Beverly Tucker be denied.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Courts Below

This appeal arises from the denial of Beverly Tucker's motion, brought pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, to vacate a summary judgment order entered by the Bankruptcy Court in favor of the Law Firm as to Ms. Tucker's claims against it. These claims were asserted in a negligence lawsuit that was removed from state court and became an adversary proceeding in the main Chapter 7 bankruptcy case of Ms. Tucker's husband, Danis R. Tucker. Beverly Tucker was not a joint debtor in her husband's bankruptcy.

The United States District Court for the Southern District of Texas, Corpus Christi Division, affirmed the decision of the Bankruptcy Court, which denied the Rule 60(b) relief sought by Ms. Tucker. Pet. App. B.[1] The United States Court of Appeals for the Fifth Circuit upheld the decision of the District Court (Pet. App. A), and also subsequently denied Ms. Tucker's Petition for Rehearing. Pet. App. C.

---

1. Reference is made to the documents contained in the Appendix to the Petition for Writ of Certiorari.

B. Statement of Facts

Danis R. Tucker, d/b/a Ralphs Food Co., d/b/a Ralphs Foods Co., d/b/a Laredo Spice Co., d/b/a Pepper Tree Foods, d/b/a Nevada Converting Company, d/b/a Silver State Bookkeeping Services, d/b/a Fifth Avenue Fashions, d/b/a B G Tucker (hereinafter Danis R. Tucker d/b/a Ralphs Food Co.), filed a Chapter 11 bankruptcy petition on July 7, 1994. Beverly Tucker did not join her husband in this filing.[2] The case was converted to a proceeding under Chapter 7 on February 21, 1995. The Law Firm represented Danis R. Tucker in his bankruptcy case from the date of filing of the Chapter 11 petition through October 18, 1994, at which time the Bankruptcy Court permitted the Law Firm to withdraw from representation.

On July 8, 1996, Beverly Tucker filed suit against the Law Firm in the 156th Judicial District Court of San Patricio County, Texas, alleging attorney negligence and violations of the Texas Deceptive Trade Practices Act on the part of the Law Firm in connection with its bankruptcy representation of her husband. On August 7, 1996, the Law Firm removed the state court action to Bankruptcy Court on the basis that the causes of action alleged were property of the estate of Danis R. Tucker.

---

2. Ms. Tucker asserts in her Statement of Facts that none of the opinions of the lower courts mention that she was not a party to the bankruptcy proceeding. That she was not a joint debtor in her husband's bankruptcy proceeding has always been included by the Law Firm in its statement of facts to the lower courts. There can be no dispute, however, that upon removal of her state court lawsuit to bankruptcy court, Ms. Tucker was a party to an adversary proceeding in bankruptcy court and actively participated in the summary judgment proceedings resulting in the order that she later sought to vacate.

Beverly Tucker filed a Motion to Remand, to which the Law Firm filed a Response, and a hearing was held by the Bankruptcy Court on October 7, 1996. At the hearing, the Bankruptcy Court determined that a prerequisite to the decision whether to remand was a determination of whether Beverly Tucker might be precluded as a matter of law by the doctrines of res judicata or collateral estoppel from asserting her claims against the Law Firm, due to the previous approval of the Law Firm's fee application in the main bankruptcy case. The Bankruptcy Court instructed the Law Firm to file a motion for summary judgment addressing this question.

The Law Firm filed its motion for summary judgment and Beverly Tucker filed her responses to the motion. A hearing was held on November 25, 1996 and on March 12, 1997, the Bankruptcy Court's Memorandum Opinion and Order granting the Law Firm's motion was entered.[3]

The events subsequent to entry of this order have been the basis of this appeal. Beverly Tucker contends that she did not receive notice of the entry of this order until April 16, 1997. *See* Pet. at 4.[4] On April 17, 1997, acting *pro se*,

---

3. In granting the motion, the Bankruptcy Court relied on *In re W.J. Servs., Inc.*, 139 B.R. 824, 827 (Bankr. S.D. Tex. 1992) for the proposition that the approval of a fee application amounts to a full and final litigation of the issues of the quality, reasonableness and necessity of work performed and that implicit in such an approval is a finding that no malpractice occurred.

4. Throughout this appeal, Ms. Tucker has stated that the Law Firm admits that she did not receive notice from the bankruptcy court clerk of the entry of summary judgment in time to initiate an appeal. The more accurate characterization of the Law Firm's (Cont'd)

Ms. Tucker filed a "Motion for Leave of Court to File Late Timely Appeal on Memorandum Opinion and Order Granting Defendants' Motion for Summary Judgment." This motion was denied by the Bankruptcy Court by order entered September 29, 1997.

Beverly Tucker then filed, on July 2, 1997, a "Motion for Court to Vacate Order Granting Summary Judgment." This motion was amended and refiled on or about January 23, 1998 after Ms. Tucker retained counsel. Following a hearing on March 16, 1998, the Bankruptcy Court denied Ms. Tucker's motion to vacate and an appeal ensued, leading to the filing of the Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Ms. Tucker is unable to demonstrate that she is entitled to relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure as her failure to receive notice of the entry of summary judgment against her did not result in the type of case disposition for which Rule 60(b) is intended to provide relief. Ms. Tucker also fails to demonstrate that she possesses a meritorious cause of action such that vacating the summary judgment would not be a futile exercise. Finally, the circumstances of Ms. Tucker's case are not so extraordinary as to justify relief under Rule 60(b)(6).

(Cont'd)
position is that it has always recognized that this was Ms. Tucker's *contention* and has proceeded on this assumption. As a practical matter, the Law Firm can neither admit or deny whether Ms. Tucker received such a notice because it is a fact over which the Law Firm has no control.

REASONS FOR DENYING THE WRIT

PETITIONER HAS FAILED TO DEMONSTRATE THAT THIS CASE INVOLVES CONSIDERATIONS JUSTIFYING REVIEW ON CERTIORARI.

To justify vacating the summary judgment order, Beverly Tucker must demonstrate the existence of one of the six grounds for relief set forth under Rule 60(b) of the Federal Rules of Civil Procedure, as adopted by Bankruptcy Rule 9024. These grounds are:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for anew trial under Rule 59(b);
>
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; and
>
> (6) any other reason justifying relief from the operation of the judgment.

Throughout the course of this litigation, Ms. Tucker has stated her grounds for relief in terms of the circumstances described in subsections (1) and (6) of Rule 60(b), and this continues to be the case in the Petitioner's argument herein. *See* Pet. at 5. With respect to the grounds stated in Rule 60(b)(1), which are "mistake, inadvertence, surprise, or excusable neglect," Ms. Tucker asserts that her failure to file a timely appeal of the summary judgment order were due to circumstances beyond her control and thus, she is unquestionably entitled to relief under the "excusable neglect" element of Rule 60(b)(1).

When the purpose of Rule 60(b) is examined, however, Ms. Tucker's circumstances are not those that the Rule was intended to ameliorate. The courts of appeal that have addressed the issue have applied Rule 60(b) so as to avoid the dire consequences of defaults and dismissals.[5] It was in

---

5. *See, e.g., Greater Baton Rouge Golf Ass'n v. Recreation and Park Comm'n for the Parish of East Baton Rouge*, 507 F.2d 227, 229 (5th Cir. 1975) (reversing trial court's denial of Rule 60(b) relief following dismissal with prejudice due to failure of plaintiff's counsel to appear at trial); *Spann v. Commissioners of the Dist. of Columbia*, 443 F.2d 715, 716 n.1 (D.C. Cir. 1970) (exercise of court's discretion in denying motion to revive and reinstate cause of action after agreed dismissal and collapsed settlement would be reviewed closely); *Tolson v. Hodge*, 411 F.2d 123, 130 (4th Cir. 1969) (Rule 60(b) is to be liberally construed in order to provide relief from onerous consequences of defaults and default judgments); *Leong v. Railroad Transfer Serv., Inc.*, 302 F.2d 555, 557 (7th Cir. 1962) (finding abuse of discretion where judge refused to vacate dismissal for want of prosecution where counsel for each party was under mistaken impression that court clerk would summon them to courtroom when case was to be called for trial); *Russell v. Cunningham*, 279 F.2d 797, 804 (9th Cir. 1960) (finding abuse of discretion where judge declined to vacate dismissal for want of prosecution).

fact a default judgment of denaturalization that was at issue in the *Klapprott* decision on which Petitioner relies. *See Klapprott v. United States,* 335 U.S. 601, 603, 69 S. Ct. 384, 385 (1949) (district court entered judgment by default in denaturalization proceedings and canceled certificate of naturalization).

Ms. Tucker's case did not involve a dismissal of her causes of action against the Law Firm. As set forth in the Statement of Facts above, the Law Firm filed a Motion for Summary Judgment in the Bankruptcy Court and Ms. Tucker filed more than one response. The matter came on for oral argument on November 25, 1996, and there is no dispute that Ms. Tucker was in attendance at this hearing. Therefore, this case is not one in which a pure technicality prevented consideration of Ms. Tucker's causes of action, but is a situation in which the litigant who received an unfavorable ruling is, predictably, disappointed and dissatisfied with the trial court's application of the law to the facts. The remedy for this dissatisfaction does not proceed from Rule 60(b), and the United States Court of Appeals for the Fifth Circuit correctly refused to apply Rule 60(b) so as to permit Ms. Tucker to "simply seek reconsideration of claims." *See* Pet. App. 3a.

Neither has Ms. Tucker been able demonstrate during the course of her appeal that she possesses a meritorious cause of action.[6] The failure to make such a showing was

---

6. That a Rule 60(b) movant must make a showing of a meritorious claim or defense is a well-settled proposition among the courts of appeal. *See Murray v. District of Columbia*, 52 F.3d 353, 355 (D.C. Cir. 1995) (as precondition to Rule 60(b) relief, movant must provide court with reason to believe that vacating

(Cont'd)

cited by the District Court, which noted in its order of January 12, 1999 that "[t]he Court finds the likelihood of success on the merits to be remote." *See* Pet. App. at 4a. The alleged merits of her causes of action against the Law Firm are addressed nowhere in the Petition for Writ of Certiorari.

Ms. Tucker also argues that she is entitled to relief under subsection (6) of Rule 60(b), which recognizes "any other reason justifying relief from the operation of the judgment." In this regard, Ms. Tucker cites this Court's decision in *Klapprott v. United States*, 335 U.S. 601, 69 S. Ct. 384 (1949) for the proposition that Rule 60(b) relief should be granted if the movant can demonstrate that the adverse judgment was entered because of circumstances beyond her control. Ms. Tucker's situation, however, is clearly incomparable to the circumstances of the denaturalized citizen in *Klapprott*, who was imprisoned, weakened by illness and without funds to

---

(Cont'd)
judgment "will not be an empty exercise or a futile gesture"); *Pease v. Pakhoed Corp.*, 980 F.2d 995, 998 (5th Cir. 1993) (noting that bare and conclusory allegations of plaintiff's complaint failed to satisfy seminal requirement of meritorious claim or defense required for Rule 60(b) relief); *United States v. Timbers Preserve, Routt County, Colo.*, 999 F.2d 452, 454 (10th Cir. 1993) (Rule 60(b) movant must have meritorious defense, as well as good reason to set aside default); *Boyd v. Bulala*, 905 F.2d 764, 768 (4th Cir. 1990) (under all provisions of Rule 60(b), threshold condition for granting relief is that movant demonstrate that granting of relief will not in end have been futile gesture); *Beshear v. Weinzapfel*, 474 F.2d 127, 132 (7th Cir. 1973) (party moving for relief under Rule 60(b) must show facts which, if established, might reasonably be said to be basis of recovery); *Madsen v. Bumb*, 419 F.2d 4, 6 (9th Cir. 1969) (district judge did not abuse discretion in refusing to set aside default judgment when defendant failed to provide evidentiary support of substantial defense).

hire an attorney at the time of the default judgment in question. *Klapprott*, *supra*, 335 U.S. at 613-14, 69 S. Ct. at 390. Ms. Tucker's are not the extraordinary circumstances justifying application of subsection (6) of Rule 60(b).

CONCLUSION

The Petition for Writ of Certiorari reflects Petitioner's dissatisfaction with the lower courts' application of the law to the facts of her case and nothing more. As demonstrated above, the United States courts of appeals that have ruled on the issue, including the United States Court of Appeals for the Fifth Circuit which issued the decision below, are in accord in their interpretation and application of Rule 60(b). Furthermore, the decisions of the United States courts of appeal do not conflict with any decisions of this Court on the application of Rule 60(b). Petitioner's case does not place in issue any other possible circumstance justifying review by this Court.

For the foregoing reasons, Robert C. Wolter, Attorney, Debra J. Greer, Attorney, and the Law Firm of Wood, Boykin & Wolter, a Professional Corporation, respectfully request that this Court deny the Petition for Writ of Certiorari filed by Beverly Tucker.

Respectfully submitted,

RONALD A. SIMANK
Counsel of Record
SCHAUER & SIMANK, P.C.
615 North Upper Broadway
Suite 2000
Corpus Christi, Texas 78477
(361) 884-2800

LAURA M. BAKER
329 Wilshire Place
Corpus Christi, Texas 78411
(361) 814-0332

Attorneys for Respondents
Robert C. Wolter, Attorney,
Debra J. Greer, Attorney,
and Law Firm of Wood, Boykin
& Wolter, a Professional
Corporation